United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with Affidavit of Service

74-1877

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1877

UNITED STATES OF AMERICA,

Appellant,

—against—

JUAN ANTONIO SUAREZ,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

MORROW D. MUSHKIN
ATTORNEY FOR APPELLEE
600 OLD COUNTRY ROAD
GARDEN CITY, NEW YORK 11530

TABLE OF CONTENTS

TABLE OF CASES ON STATUTES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellant,

-against-

JUAN ANTONIO SUAREZ,

Appellee.

- X

PRELIMINARY STATEMENT

This is an appeal by the United States of America from an order granting the motion of appellee, JUAN ANTONIO SUAREZ, for a judgment of acquittal. The defendant appellee was indicted with a co-defendant for violations of Title 21 United States Code, Section 846, Section 841 subdivision a (1) and Title 18 United States Code, Section 2.

At the close of the Government's case, a motion was made for a judgment of acquittal, which motion was denied except for one (1) count of the indictment, to wit: Count Three which was dismissed. At the close of the entire case the motion for judgment of acquittal was renewed and denied.

The matter was submitted to the jury which was unable to reach a verdict. A mistrial was declared by the Court. Subsequently a formal motion for a directed verdict of acquittal was made on notice to the Government. It is from the decision of Judge Dooling dated November 9th, 1973 granting defendant-appellee's motion for a judgment of acquittal on the remaining two (2) counts that the Government appeals.

QUESTIONS RAISED BY THE GOVERNMENT'S APPEAL

Whether jeopardy has attached to a defendant when, after a trial resulting in the jury being unable to agree on a verdict, a verdict of acquittal is directed by the Trial Judge.

Whether in the case at bar the evidence was sufficient to allow the jury to find the defendant guilty.

CONSTITUTIONAL PROVISION INVOLVED

The first issue raised by the Government concerns the United States Constitution, Amendment 5, which reads as applicable to this case... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...

STATEMENT OF FACTS

On January 23rd, 1973, late in the evening of that day at a bar known as "Mi Bohio" owned by the wife of the defendant, an undercover police officer of the New York City Police Department had a conversation with the defendant. During that conversation the defendant was told that the undercover officer was interested in purchasing 1/8th of a kilogram of cocaine and that the only way it would be purchased was if it was of good quality and if the price was right. The defendant replied "we have to wait for Gina's husband who would be back in the bar later that night". The undercover officer indicated that he wanted an appointment to be made or in the alternative for the seller to be told that he was looking for an eighth of kilogram of cocaine for the next day between 7:00 and 8:00 P.M. The defendant then stated that he would do it but if the undercover could, he should return the same night and talk to the man himself. (22,23)

Early in the morning of the next day the undercover officer returned and spoke to the defendant who told him that "he was going to talk to the man now", indicating a man at the other side of the bar. The man referred to, Alberto Vera,

also known as Alberto Zapato, testified on behalf of the Government that on the 23rd or 24th day of January, 1973, the defendant told him "there were two (2) people who were interested in some business introduced me to them". He told him "it was a business of cocaine, drugs" and thereupon introduced him to the undercover officer and another man.(92)

Thereafter the defendant, the other man, the undercover officer, were seated at the bar in that order with Mr. Vera standing next to the undercover officer on the other end. Mr. Vera and the undercover officer were (112) engaged in a discussion concerning the sale of drugs. The defendant was in a discussion with the other man on a topic unknown to Mr. Vera. There was no interaction between the two (2) conversations and Mr. Suarez, the defendant-appellee, did not participate in the discussion between the undercover officer and Mr. Vera, although he was approximately four (4') feet away from Mr. Vera. Mr. Suarez did not ask any questions or make any comments to, or concerning the conversation between Mr. Vera and the undercover officer. Although it may have been possible that the defendant heard the conversation taking place between Vera and the undercover officer, there was no evidence to that effect and Mr. Vera testified that he could not hear the conversation that Mr. Suarez was engaged in.(113, 114)

Thereafter, 1/8th of a kilogram of cocaine was sold by Mr. Vera to the undercover officer for the sum of $2,300.00. Mr. Suarez, defendant appellee, did not ask for nor was he given any portion of the proceeds of the sale. There was, in fact, no testimony whatsoever concerning any consideration flowing to the defendant appellee from the co-defendant for this or from any transaction. (28, 29)

Approximately three (3) days later Mr. Vera asked the defendant appellee whether the people that he had sold the cocaine to were to be confided in and "were alright". He wanted to know whether they were very reliable, because not (the undercover officer) but a fat one, a Cuban was asking me for 2/8ths after I had sold the 1/8th". The defendant appellee said "you could confide in them because they knew the gentleman from Cubafor many years..., and he said I could do it with no problem." (100)

The defendant appellee had no relationship with Mr. Vera whatsoever concerning the purchase, possession, or sale of drugs up to the 23rd day of January, 1973, nor did he have any such relationship thereafter, nor did he know the details of the transaction between the undercover officer and Mr. Vera, nor when the sale was going to be completed. Mr. Vera testified that he never expected him to get customers for drugs.(110)

The foregoing has been a summary of the evidence adduced by the Government. It is to be noted that the defendant-appellee categorically denied any knowledge whatsoever of the fact that a sale of cocaine was to take place. (82a) In addition he testified that he had never seen the undercover officer before in his life and that the (71, 74) person who was involved in the discussions with him was another person who did not testify at the trial but was briefly in the back of the Courtroom during one of the sessions of the trial. (86).

POINT I

AMENDMENT 5 OF THE CONSTITUTION BARS RETRIAL OF THIS CASE.

The Amendment 5 of the Constitution of the United States was introduced to correct an evil which had existed earlier under the Laws of Great Britain. The very wording of the Amendment, "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb:..." is a magnificent example of clear concise Legislation. The wording and intent are obvious.

Title 18 U.S.C. Section 3731 grants to the United States the right to appeal "...except that no appeal shall lie whether double jeopardy clause of the United States

Constitution prohibits further prosecution."

There is no question then that if a further prosecution is not barred by the Fifth Amendment of the United States Constitution, a liberal construction of Section 3731 grants to the Government the right to appeal from the order of Judge Dooling. However, the question is not easily resolved. In the case at bar, motions made during the trial were denied. The motion made subsequent to the inability of the jury to come to a verdict was the motion that was granted dismissing this indictment. This decision was, of necessity, on the merits. All of the evidence had been adduced all the arguments had been presented. It was only after the totality of this case was heard that Judge Dooling decided that the defendant was innocent. The declaration of a mistrial after the failure of the jury to agree is cited as being out of "manifest necessity". Can it really be said that this trial was terminated prematurely? *United States vs. Velazquez, 490 F 2nd 29 (Second Circuit 1973)* That recent case which is so troublesome here we can find it in an easily distinguished state of facts. Velazquez was dismissed without a trial, without an evidentiary hearing, and without any evidence whatsoever having been introduced. That type of case will be troublesome even

under a direct approach to the question of jeopardy. When does jeopardy attach to a defendant? Is it when he is formally charged by an information or an indictment? Is it when the first juror is seated? Is it when the first statement concerning the alleged guilt of the defendant is made by the prosecuting attorney? Is it when the first witness testifies? Is it when the first evidence of guilt is adduced at the trial? Is it when the Government rests its case? Is it when the case is submitted to a jury at the close of the entire case?

Is it respectfully submitted that the wording of Amendment 5 to the Constitution of the United States of America is unequivocal. *Jeopardy attaches at the time the defendant stands accused of the crime.* In any event none of the questions above presented need be answered to determine that this defendant-appellee was placed in jeopardy of life or limb; he was tried all the way up to the point where a jury deliberated on his fate. It was subsequent to that time, and only subsequent to that time that Judge Dooling made his decision directing a verdict of acquittal.

The New York State Constitution which in Section 6 of Article 1 states "no person shall be subject to be twice put in jeopardy for the same offense" is essentially

the same as Amendment 5 to the United States Constitution. It has been determined in New York State that jeopardy attaches when a defendant has been put on trial before a Court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, when a jury has been impanelled and when some evidence is taken. *People vs. Jackson 20 N.Y. 2nd 448, 285 N.Y.S. 2nd 8, 14.* This then is a determination as to when jeopardy attaches. Clearly . if the rule in Jackson were to be applied to the instant case, jeopardy has attached.

To determine that jeopardy has not attached in the case at bar, would be to stretch logic beyond its normal stretching point.

Assuming that it be found, then, that jeopardy has attached, it is incumbent upon us to determine what has happened to that "jeopardy". Has it unattached? Or does it remain attached?

Title 18, U.S.C. Section 3731 proports to unattach jeopardy except where Amendment 5 provides that it has attached. This Section is of little help to us in the case at bar. The question still exists as to what deter-

mination was made by Judge Dooling.

It is submitted that the decision made by Judge Dooling was on the merits; the trial had been completed and upon all of the evidence which had been adduced, Judge Dooling determined that as a matter of law there was insufficient evidence to prove the defendant guilty of the commission of the crime charged. Considering this, then, does the fact that prior to Judge Dooling's determination, a jury was unable to reach a verdict break the chain of procedures so that jeopardy is "unattached". It seems not.

POINT II

CONSIDERING THE EVIDENCE IN THE BEST LIGHT FOR THE GOVERNMENT, IT DID NOT CONSTITUTE A SUFFICIENT QUANTUM OF EVIDENCE, WHICH IF BELIEVED WOULD HAVE BEEN SUFFICIENT TO CONVICT THE DEFENDANT APPELLEE.

Apparently this Circuit has not ruled on this question.

In the Third, Sixth, Eighth and Ninth Circuits and in the State of New York which effect this point. They are all relatively in accord that effectual situation such as in the instance case, sufficient grounds do not exist for the jury to find the defendant guilty.

In the Third Circuit, the case of *United States of America vs. Marie Moses, 220 F 2nd 166, Third Circuit (1955)* is nearly identical factually with the case at bar. The facts in Moses are as follows:

> On December 16th, 1952 one Cooper sold narcotics to two (2) Federal Agents. The defendant, Marie Moses was indicted under Title 18 Section 2 U.S.C. for aiding and abetting. Mrs. Moses was told by the agents that they wished to purchase drugs and asked whether she knew where to obtain the drugs. She replied that she did not have any, that Cooper was her supplier and that she could arrange for the agents to purchase drugs from him. Mrs. Moses introduced the agents to Cooper and told him that they wished to purchase drugs. Cooper asked whether the agents "were alright". She vouched for them. The agent then negotiated a deal with Cooper. Mrs. Moses heard the conversation of the negotiation but took no part in it. The drugs were subsequently sold to the agents and delivered, all in the absence of Mrs. Moses.

The Court in Moses held that Mrs. Moses acted at the behest of the buyer; that she did two (2) things to facilitate the purchase; first that she introduced them, and second that she vouched for them. There was no proof of any interest of the defendant, Moses, with the enterprise of the seller. The Court held that acts very similar to the one in the case at bar did not constitute the crime of aiding and abetting.

In the Sixth Circuit, in a case that dates from 1942, a Dr. Platt was asked whether he could obtain heroin to dope horses with. Dr. Platt referred the agent's informant to another person in another state wherein heroin was purchased.

U.S.A. vs. Morei, 127 F 2nd, 827, Sixth Circuit (1942). In that case Dr. Platt was acquitted.

In *U.S.A. vs. Patricia Atkins, 473 F 2nd, 308, Eighth Circuit (1973),* the Moses case was distinguished by the majori and cited by Senior Judge Larimore in his dissent

> "The critical difference between Moses and Atkins is that in Atkins the defendant actively sought out the buyer."

Senior Judge Larimore in his dissent would have extended the rule in Moses to the facts in Atkins but that the conduct portrayed therein could not "as a matter of law constitute aiding and abetting in the purchase of heroin".

There is no evidence that Moses, Platt or the defendant-appellee actively solicited on behalf of the seller; nor is there any evidence that Moses, Platt, Atkins or the defendant-appellee received the proceeds or a portion thereof of any of the sales. Nor is there any evidence upon which the jury might properly conclude that Moses, Platt, or the defendant-appellee aided and abetted the sale or distribution of narcotics.

New York State has followed this line of reasoning and closely associated line of cases pursuant to a similar Statute in New York on "criminal facilitation, *People vs. Gordon, 343 N.Y.S. 2nd 103, 32 N.Y. 2nd 62 (1973) Court of Appeals New York.* The Gordon case may be cited for the

propositions that "mere directing to or recommending of a source of drugs supplier is not sufficient to sustain a criminal prosecution for facilitation". Gordon cites 43 ALR 3rd 1072.

The Court properly directed a verdict of acquittal.

CONCLUSION

The directed verdict of acquittal was had at the close of the entire case, it was on the merits, and not based on the mere technicality. Clearly jeopardy has attached and a further prosecution of the defendant-appellee is barred by Amendment 5 of the Constitution of the United States. The decision of the Trial Court in directing a verdict of acquittal was proper as sufficient evidence did not exist as a matter of law for the conviction of the defendant-appellee.

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

MORROW D. MUSHKIN
Attorney for Defendant-Appellee
Office and Post Office Address
600 Old Country Road
Garden City, New York, 11530

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

JANE VERIPAPA, being duly sworn, deposes and says:

That she is secretary to MORROW D. MUSHKIN, Esq., the attorney for the above named Appellee herein. That on the 1st day of August, , 1974, she served the within Appellee's Brief (2 Copies) upon David G. Trager the attorney(s) for the above named appellant by depositing a true copy of the same securely enclosed in a post-paid wrapper in the ~~Mail Chute~~ Official Depository maintained and exclusively controlled by the United States at No. 600 Old Country Road, Garden City, New York, directed to said attorney(s) for the Appellant at No. Foley Square, New York, New York, that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there then was and now is a regular communication by mail.

That your deponent is over the age of 21 years.

Jane Veripapa

SWORN to before me this

1st day of August, 1974

MORROW D. MUSHKIN
Notary Public, State of New York
No. 30-8084100
Qualified in Nassau County
Commission Expires March 30, 1976